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MEMOIR

OF

JOSEPH STORY, LL.D.

By GEORGE S. HILLARD.

Reprinted from the Proceedings of the Massachusetts Historical Society,

For 1867–1868.

BOSTON:

PRESS OF JOHN WILSON AND SON.

1868.

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JOSEPH STORY, LL.D.

Joseph Story was born in Marblehead, on the eighteenth day of September, 1779. He was the eldest child of a second marriage. His father, Dr. Elisha Story, had served as a surgeon in the army of the Revolution, and afterwards engaged in the practice of medicine in Marblehead, with distinguished success, till his death in 1805. His second wife, the mother of Judge Story, was Mehitable Pedrick, the daughter of an opulent merchant of Marblehead. She was married at the age of nineteen, and lived to an advanced age, surviving by a few years her eminent son. She was a woman of sense and energy, with an active mind and a cheerful spirit. Left, at the death of her husband, with a numerous family and a very moderate income, she showed an admirable tact and method in the conduct of her household, and the education of her children.

Young Story was prepared for college in his native town, and entered the Freshman Class in Harvard College, in January, 1795, about half a year in advance. His college life was in all respects honorable to him. His studies embraced not merely the prescribed course of the college, but ranged over a wide field of English literature. Among his class-

mates were Dr. Tuckerman and Dr. Channing. With the latter he contended for the highest honors of his class, but always acquiesced in the decision which gave the first place to his friend. He left college, not only unstained by vice, but with a singular purity of life and conversation.

The profession of the law had been his early and only choice, and he entered upon the study of it immediately after leaving college, first at Marblehead, in the office of Chief-Justice Sewall, and afterwards at Salem, in that of Judge Putnam. His love of literature, and especially poetry, and his enthusiastic temperament, made the study of the law at first distasteful to him; and he has left it on record that he more than once wept over the crabbed pages of "Coke upon Littleton," from inability to comprehend the meaning of the rugged commentator. But these difficulties soon vanished before his resolute industry, and in his three years of preparation he laid a strong and sure foundation of knowledge, on which to build in after years. The interest with which he always pursued his researches into the most abstruse and least attractive departments of the law would seem to justify the remark which has often been made, that the best lawyers are those who at first have a natural distaste to the study.

While a student of law, he delivered, at the request of the people of Marblehead, a eulogy on Washington, which was printed, and received with favor, though written in a style which the author's mature taste condemned as bombastic and extravagant.

He was admitted to the bar in 1801, and immediately began the practice of the law in Salem. His industry, the fidelity with which he served his clients, and his frank and engaging manners soon secured him a fair and steadily increasing amount of business, though he labored under the disadvantage of having espoused the unpopular side in politics. He was a Democrat; while the wealth, cultivation, and social influence of Salem, and indeed of all Massachusetts,

were with the Federal party. Party politics then ran very high, and the recent election of Jefferson had added bitterness to the strife; and the unpopular opinions of the young lawyer exposed him to some social mortifications and neglects to which he did not pretend to be insensible. But, though sensitive and sympathetic, he was not weak or morbid; and a singularly buoyant and cheerful spirit enabled him to bear lightly what might have crushed a melancholy temperament. His early politics were explained and justified by himself in later life, when he said, "I like as much to see a young man democratic, as an old man conservative. When we are old, we are cautious and slow of change, if we have benefited by experience: when we are young, we hope too much, if we are generous and pure."

During the year 1803, the post of naval officer of the port of Salem was offered to him, but declined on the ground that its duties would interfere with his professional prospects. In 1804, he delivered a Fourth-of-July oration before the citizens of Salem, written in the declamatory style which the popular taste then approved. In the same year, he published a volume of poems, containing an improved edition of "The Power of Solitude," which had originally appeared in 1802, and several fugitive pieces. "The Power of Solitude" is a didactic poem, in two parts, in heroic verse, written at a time when Zimmerman was read and admired. His son, Mr. William W. Story, who has won such honors in art and literature, says of this production, with commendable fairness, "The defects of his poem are exaggeration of feeling, confusion of imagery, and a want of simplicity of expression. The style is stilted and artificial. But, though dull as a poem, it shows facility and talent for versification, breathes a warm aspiration for virtue and truth, and is creditable to his scholarship."

During the same year, he prepared for the press and published a "Selection of Pleadings in Civil Actions," a useful

and accurate manual, and for a long time, during the reign of special pleading, almost the only book of forms used in this country. On the ninth day of December, Mr. Story was married to Miss Mary Lynde Oliver, a young lady to whom he had been long and tenderly attached; but his domestic happiness was destined to be of brief duration, for his wife's health began to decline soon after their marriage, and she died on the 22d of June, 1805, to the inexpressible grief of her husband. Her person and manners were pleasing, her mind was cultivated, and her disposition amiable and gentle. Her image was always recalled by her husband with affectionate tenderness. Two of the smaller pieces in his printed volume of poems were by her.

In 1805, he was chosen a member of the Legislature of Massachusetts, to represent the town of Salem, and was annually re-elected till his appointment to the bench. He soon came to be recognized as the leader of his party in the House, and was often obliged to contest, almost single-handed, against the powerful array of ability and influence which supported the Federal cause. In these contests he bore himself with a courage and eloquence which extorted hearty praise from the more generous of his opponents. He was an ardent, but not a bitter or an unscrupulous, partisan.

On one occasion he showed a manly and honorable independence of party ties. In 1806, a vacancy occurred in the office of Chief Justice of the Supreme Court of Massachusetts, and it was felt highly desirable to secure for the place the unrivalled legal abilities of Mr. Theophilus Parsons, then in large practice in Boston. It was understood that he would accept the office, if the salary were made honorable and permanent, it being then neither the one nor the other. Mr. Parsons was obnoxious to the Democrats, who at that time were in power in Massachusetts, because he was an uncompromising Federalist, whose great powers had been often exerted on behalf of his party. But Mr. Story put aside all

political prepossessions, and carried successfully through the House, in spite of the opposition of his own party, a bill which increased the salaries of the judges and made them permanent.

Nor was this all. Mr. Parsons accepted the office, but, after holding it three years, he sent for Mr. Story, and frankly told him that his salary was insufficient for the support of his family, and that he must resign his office unless it were increased. The Democratic party then had a majority in both branches of the legislature. A bill further enlarging the salaries of the judges, drawn by Mr. Story, was reported, and, through his personal influence, carried through both branches of the legislature. He was for a long time denounced by some of the journals of his own party for the part he took in these measures.

In January, 1806, he drew up an able memorial from the inhabitants of Salem to the President and Congress, on the infringement of the neutral trade of this country by Great Britain.

In the winter session of 1808, he made an elaborate report in favor of the creation of a court of chancery for the State of Massachusetts, and accompanied it by a corresponding bill; but the proposed measure was not successful.

In the month of August, 1808, he was married to Miss Sarah Waldo Wetmore, a lady with whom he lived in great happiness until his death.

In the autumn of 1808, he was elected a member of Congress, to supply the vacancy caused by the death of the Hon. Jacob Crowninshield. He served only for the remainder of the term for which he was chosen, and declined a re-election; his hopes and aspirations being professional, and not political. While in Congress, he manifested his usual independence by giving his support to propositions to increase the navy and to repeal the embargo; in both cases acting against the party to which he belonged. Mr. Jefferson was displeased at his

course, and in one of his letters calls him a "pseudo-republican."

In 1809, engrossed as he was with business and politics, he found time to edit a new edition of "Chitty on Bills of Exchange and Promissory Notes"; appending to it a large body of valuable annotations. In 1810, he prepared an edition of "Abbott on Shipping," and, in 1811, an edition of "Lawes on Assumpsit"; to both works adding copious notes.

In January, 1811, he was chosen Speaker of the House of Representatives of Massachusetts, in the place of the Hon. Perez Morton, appointed Attorney-General of the State; and, on the organization of the new House, in the succeeding May, he was re-elected to the same station. During the short time that he held this office, he presided over the deliberations of a crowded and somewhat stormy body, to the satisfaction of all the members.

In 1810, the seat of Associate Justice of the Supreme Court of the United States became vacant, by the death of Mr. Justice Cushing. The place was first offered by President Madison to the Hon. Levi Lincoln, who declined it; and then to the Hon. John Quincy Adams, at that time in Russia, by whom it was also declined. In the month of November, 1811, the appointment was, very much to his surprise, offered to Mr. Story, and, after some reflection, accepted. The annual salary of a judge of the supreme court was then only thirty-five hundred dollars, and as his professional income at that time was nearly double in amount, he made no slight pecuniary sacrifice in leaving the bar; but he was induced to accept the office mainly because of the opportunity it afforded him to pursue those juridical studies which were most congenial to his tastes.

Mr. Story, when he went upon the bench, was only thirty-two years old, a very early, and, with the exception of Mr. Justice Buller, an unprecedented, age for a lawyer to be

advanced to a seat upon the highest judicial tribunal of his country. When we call to mind his youth, and remember how earnest and conspicuous he had been on the unpopular side in politics, it will not be a matter of surprise to learn that the news of his appointment fell with something like consternation upon the elder, the more apprehensive, and the more conservative portion of the people of New England. His merits as a lawyer could be scanned only by his professional brethren: his sweet and generous nature could be appreciated only by his friends. The public knew him as an enthusiastic partisan; and it is not too much to say that with many there was an apprehension that, in his hands, rights and property would hardly be safe. It is hardly necessary to add, that the existence of such fears was a striking proof of the truth of Mr. Jefferson's saying. "How much we suffer from misfortunes that never happen!" From the moment he assumed his judicial office, he shook the dust of politics from his feet; and he bore himself with such absolute impartiality, that it is literally true that there was no act of his judicial life from which it could have been known to which of the two great parties which divided the country he had previously belonged.

From 1811 till 1829, when he removed to Cambridge, the life of Judge Story flowed on in a uniform and uneventful current. About three months of every year were spent with the Supreme Court in Washington, and several weeks were devoted to the judicial duties of his circuit, embracing Maine, New Hampshire, Massachusetts, and Rhode Island. His life was useful, laborious, and happy. His duties were eminently congenial to his taste and the nature of his mind. His legal studies were pursued with an appetite that grew with what it fed upon. His hopes and aspirations were all confined to the sphere of the bench, and he never cast a lingering look back upon the political field he had left. His warm domestic and social tastes found satisfaction in a happy home, and in a

large circle of relatives and friends, by whom he was regarded with equal pride and affection. A busier or a happier man it would not have been easy to find. His lot was not exempt from those trials by which the soul of man is tried and ripened. Of seven children who were born to him, four were taken away by death during these years; and his letters show how acutely he felt these losses, and with what Christian resignation he bore them.

During this period, Judge Story's judicial labors, great as they were, did not absorb all his time or energies. His miscellaneous occupations and occasional productions would alone have been enough to save him from the reproach of being an idle man. On the 23d of August, 1813, he delivered a eulogy at Salem, on the occasion of the re-interment of the bodies of Captain James Lawrence and Lieutenant Augustus C. Ludlow, who were killed on the 18th of June of the same year, in the engagement of the Chesapeake with the Shannon. Their remains were at first buried at Halifax, whence they were removed to Salem. Though hurriedly prepared, and under the depression of illness, it was well received by the public. The elaborate memorial of the merchants of Salem against the tariff, in 1820, was drawn up by him. In 1821, he delivered an address before the members of the Suffolk bar, which was published in the "American Jurist" in 1829, and republished in England, in Clark's "Cabinet Library of Scarce and Celebrated Tracts."

In 1826, he pronounced the annual discourse before the Phi-Beta-Kappa Society of Harvard College; a performance marked by a flowing ease of style, and showing a wide range of literary cultivation. In 1828, he delivered the centennial address in commemoration of the two-hundredth anniversary of the first settlement of the town of Salem, — a beautiful discourse, perhaps the finest and most finished of all his occasional productions, abounding with passages of a rich and animated eloquence; among which may be especially enumer-

ated the closing paragraphs, and the pathetic reflections on the fate of the Indians. He also wrote biographical sketches of Samuel Dexter, Mr. Justice Trimble, Mr. Justice Washington, Chief-Justice Parker, William Pinkney, and Thomas Addis Emmett. He contributed to the "North-American Review" articles on Hoffman's "Course of Legal Study," on Jacobsen's "Laws of the Sea," on "Johnson's Reports," on "Phillips on Insurance," and on Dane's "Abridgment of American Law." These were not merely literary notices of the several works reviewed, but elaborate essays on the subjects discussed in them; marked by the same thorough research and exhaustive learning which distinguish the writer's judicial opinions.

In the "Encyclopædia Americana," the titles, Congress, Contract, Courts of the United States, Criminal Law, Capital Punishment, Domicile, Equity, Jury, Lien, Law Legislation and Codes, Natural Law, National Law, Prize, and Usury, were furnished by him. The elaborate notes in "Wheaton's Reports," on the Principles and Practice in Prize Courts, on Patent Laws, on Charitable Bequests, on Piracies, and on the Admiralty Jurisdiction, as well as on several others of less importance, occupying no less than one hundred and eighty-four closely printed pages, were written by Judge Story. The following entry in one of his memorandum books is worthy of being here copied, as illustrating the beautiful disinterestedness of his nature, and his readiness to serve his friends: —

"June 12, 1819. It is not my desire ever to be known as the author of any of the notes in Mr. Wheaton's 'Reports.' Lest, however, the fact should transpire, and it should be supposed he is under obligations to me for notes which are his own, I think it best to put down those notes which I have written. I made it an express condition, that the notes furnished by me should pass as his own; and I know full well that there is nothing in any of them which he could not have prepared with a very little exertion of his own diligence and learning."

Then follows an enumeration of the notes.

To be willing to labor without reward is no uncommon trait; but there are few who thus rise superior to the love of fame, and silently allow a friend to wear the honors of patient and conscientious research.

To this period of his life also belongs his impressive charge to the grand jury at Portland, in 1821, on the horrors of the slave trade.

In 1820, after the separation of Maine from Massachusetts, a convention was called to revise the Constitution of the latter State. To this convention — a body remarkable for wisdom, ability, and comprehensive patriotism — Judge Story was sent as a delegate from the town of Salem. He took a deep interest in its proceedings, and an important part in its debates. He maintained the all-important principle of the independence of the judiciary, in a powerful argument, which was never reported. The published debates of the convention contain a beautiful specimen of his deliberative eloquence, in a speech on the basis of the senatorial representation; in which he considered the influence which property has, and should have, upon government.

In 1818, Judge Story was elected a member of the Board of Overseers of Harvard College. In January, 1825, he delivered before this body an argument against a claim set up in a memorial presented by some of the professors and tutors of the college, that none but resident instructors were eligible as "Fellows" of the corporation. This argument, which was confined wholly to the legal merits of the case, is full of curious and recondite learning upon a novel question, which had hardly ever before been investigated in this country. In the year 1825, he was elected a member of the Corporation, and continued to hold this office until the time of his death, faithfully and diligently discharging the duties of this trust.

In 1829, an important change took place in Judge Story's life and labors. In the early part of that year, Mr. Nathan Dane, of Beverly, — so honorably known, alike as a legislator

and a jurist,— stated to him, in a personal interview, that he proposed to bestow ten thousand dollars upon Harvard College, to found a professorship of law, but upon the express condition that he should be the first incumbent of the chair. Judge Story, who had already declined to accept the Royall Professorship of Law at Cambridge, was at first unwilling to accede to Mr. Dane's proposition; but after much reflection, finally consented, mainly on the ground that his refusal would deprive the college of a useful and honorable foundation. He was accordingly elected, by the Corporation, Dane Professor, on the eleventh day of June, and Mr. John Hooker Ashmun, of Northampton, — a young man of extraordinary promise in the law, cut off before his prime, — was appointed Royall Professor. Their inauguration took place Aug. 29, 1829, on which occasion Judge Story pronounced a beautiful and appropriate discourse. He left Salem, not without many painful regrets, in September, and immediately entered upon the duties of his office. From 1817 to 1829, the average annual number of students in the Law School had been about eight; but the name and reputation of Judge Story exerted an attractive force unknown before; and before the close of the first year of his professorship, the number of pupils had increased to thirty.

Busily occupied as he now was with his old and new duties, he found time to prepare and deliver, in November, 1829, a discourse before the Boston Mechanics' Institute, at the opening of their annual course of lectures, on the Value of the Mechanic Arts and the Influence of Science. These themes were treated in a manner adapted to a popular audience, and enlivened with copious illustrations.

In December, 1830, a plan having been arranged that the professors belonging to the college should deliver a series of lectures before an audience composed of their families and friends, Judge Story opened the course with a lecture, in which he maintained the advantages of a wide and generous

cultivation, rather than an exclusive devotion to any single study. At the close of the series, he gave a lecture on the relation of husband and wife.

The happy current of Judge Story's life was now to be broken by perhaps the sharpest sorrow of his life. On the 10th of May, 1831, his youngest daughter, Louisa, — a child singularly lovely in person and attractive in character, — died of scarlet fever, after a very short illness. The blow was the more desolating from its unexpectedness, as his daughter had always enjoyed the most blooming and radiant health. The writer of this sketch well remembers the overwhelming grief of Judge Story under this bereavement, and the wide and deep sympathy which it called forth, as well as the resolute energy with which he sought relief from torturing recollections in the earnest discharge of his official and academic duties. But, though he rallied from the shock, he never entirely recovered from it. After this loss, the world never was to him quite what it was before, and a shade of gentle melancholy hung over his brightest hours and purest satisfactions. The feelings awakened by this irreparable loss found fitting expression in the beautiful discourse delivered by him Sept. 24, 1831, on the consecration of the Cemetery at Mount Auburn, which is informed with the tenderness and sensibility of a stricken mourner, as well as the faith and hope of a submissive Christian. More than once, during the delivery of this discourse, the tide of recollection was so strong as to choke for a moment the speaker's utterance; and the sympathetic emotion of the vast audience around him was shown in the profound silence of all, and the suffused eyes of not a few. The loss of this beloved daughter also called from him the most genuine and beautiful of his poems.

In the autumn of 1831, the chief-justiceship of the Supreme Court of Massachusetts became vacant by the death of Chief-Justice Parker, and Judge Story was much pressed to accept the vacant office, but declined to do so.

In the beginning of the year 1832, Judge Story published his "Commentaries on the Law of Bailments," the first of the series of text-books prepared by him while incumbent of the professor's chair, and as aids in the teaching of the elementary principles of law. No work on the subject had previously appeared in English but the well-known essay of Sir William Jones, which could claim no other rank than that of a beautiful and scholarly outline, without the fulness or the accuracy requisite for the practitioner or the student; and the new treatise, received with great favor alike in America and England, was introduced into the Law School as a text-book, to the great satisfaction and advantage of the pupils. This work was very properly dedicated to Mr. Dane.

In the early part of 1833, Judge Story published his "Commentaries on the Constitution," in three volumes, which were received with great and general favor. A just and comprehensive tribute was paid to this work by the eminent man to whom it was so appropriately dedicated, — John Marshall, — in a letter of acknowledgment to the author: "I have finished reading your great work, and wish it could be read by every statesman, and every would-be statesman, in the United States. It is a comprehensive and an accurate commentary on our Constitution, formed in the spirit of the original text."

On the fifth day of April, 1833, he pronounced a eulogy, in the college chapel, upon his associate in the Law School, Professor Ashmun. Though prepared in the short interval between the death and the funeral of his young friend, it was a discriminating and affectionate sketch of his character and powers.

In the early part of 1834, the "Commentaries on the Conflict of Laws" were published. It was the first systematic treatise on the subject in the English language; and its admirable method, its copious learning, and the liberal spirit which pervaded it were warmly recognized by professional readers, both in England and America. It was reprinted in England,

and soon translated into German and French; and it was received by the jurists and juridical writers of the Continent with a welcome which was the best proof of the substantial merit of the work.

In August, 1834, Judge Story published in the "New-England Magazine" an essay entitled "Statesmen: their Rareness and Importance," in the course of which he gives a sketch of Mr. Webster's political career. In the same month of August, 1834, he delivered a lecture before the American Institute of Instruction, on "The Science of Government as a Branch of Popular Education," in which he maintained that it was practicable and proper to teach the science of government as a branch of popular education, and thereby insure such comprehension of its general principles as to secure intelligent legislation. With a view of illustrating and enforcing his own doctrines, he subsequently prepared a brief manual, called "The Constitutional Class-Book," which was introduced as a text-book into many schools.

On the sixth day of July, 1835, Chief-Justice Marshall died, an "old man and full of years," the object of such reverence and gratitude as had been accorded to no man since the death of Washington. This was a severe loss to Judge Story, who not only felt the highest admiration for the Chief Justice as a great lawyer and magistrate, but loved him as a personal friend with whom he had long lived on the most affectionate and intimate terms. Invited by the members of the Suffolk bar to deliver a eulogy upon the Chief Justice, he could not decline the request, though it came at a time when he was pressed by many and arduous labors. His commemorative discourse was pronounced in Boston, on the fifteenth day of October, 1835, before a large and sympathetic audience, and was afterwards published. It is a glowing and yet discriminating sketch of the life and character of Marshall, colored with the rich hues of personal feeling; but in its estimate of the intellectual qualities of this illustrious magistrate,

and of the value of his services, it was no more than an anticipation of the calm, unbiassed judgment of posterity.

During the year 1835, Judge Story prepared for the "Kritische Zeitschrift"—a periodical published at Heidelberg, under the editorial charge of Professor Mittermaier—an elaborate article on the Constitutional and Public Law of the United States. And, subsequently, he furnished for the "Revue Étrangère," at Paris, an article on the Organization and Jurisdiction of National Courts in the United States.

In the latter part of 1835, Judge Story revised and published a selection from his miscellaneous writings, which was dedicated to Mr. Josiah Quincy, then President of Harvard College.

In the early part of 1836, the first volume of his "Commentaries on Equity Jurisprudence" was published, which was followed by the second in the summer of the same year. This is a work of profound and exact learning; and, in practical value to the profession, has not been surpassed by any of Judge Story's legal treatises. He found a peculiar pleasure alike in the study and the administration of equity law. Its broad and comprehensive principles, which were in unison with his own liberal and enlightened views of jurisprudence, were expounded by him with a fulness of illustration and a depth of research which showed that his mind was working in a congenial sphere. His "Commentaries" took a place in the literature of the profession which no previous work on the same subject had occupied, and from which no subsequent rival has removed it. It was dedicated to Mr. William Prescott, a man eminently worthy of the honor, alike on professional and personal grounds.

During this busy year (1836), Judge Story prepared a memorial in behalf of his brother-in-law, Mr. Fettyplace, and other claimants, praying indemnification for the seizure of the schooner "Reward" by France, under the treaty of Feb. 2, 1832, between France and the United States, containing an

elaborate argument on several important questions of prize law.

In this same year (1836), Judge Story was appointed by Governor Everett chairman of a board of commissioners, under a resolution of the Legislature of Massachusetts, "to take into consideration the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts, or any part thereof, and to report thereon to the next Legislature, subjoining to their report a plan or plans of the best method in which such reduction can be accomplished." In his capacity of chairman, Judge Story drew up an elaborate report, recommending the reduction of certain portions of the common law to a written and systematic code, in which the principles established by the courts should be enunciated with precision.

In the beginning of the year 1838, Judge Story published a treatise on "Equity Pleadings," a work supplementary to the "Commentaries on Equity Jurisprudence," and marked by similar merits of thorough research and luminous method. It was dedicated to that great lawyer, Jeremiah Mason.

In the spring of 1839, his "Commentaries on the Law of Agency" were published, which met with the same success, at home and abroad, as his previous works. The same may be said of the "Commentaries on Partnership," which appeared in the early part of 1841. In the interval between the publications of these treatises, new editions were prepared of the works on "Bailments," on "Equity Pleadings," and on the "Conflict of Laws," involving much labor, and comprising extensive additions.

On the 23d of August, 1842, Judge Story delivered the first oration before the society of the Alumni of Harvard College, an association in which he felt much interest, and of which he was vice-president. His discourse was on the literary tendencies and demands of the age.

In November, 1842, his health gave way under his unre-

mitted labors, and he had a serious fit of illness. He recovered very slowly, and he was obliged to give up his usual course of judicial duties at Washington, and remain at home during the winter. This was the only session of the Supreme Court which he failed to attend, from the time of his appointment to that of his death, — a period of thirty-three years.

In the early part of 1843, his "Commentaries on Bills of Exchange" were published. This subject had been treated by previous writers in connection with that of Promissory Notes; but Judge Story deemed it expedient to discuss the law relating to bills of exchange by itself, and in the preface gave his reasons at some length for the change. This work was dedicated to his associate and friend, Professor Greenleaf.

In 1845, he published the last of his legal treatises, his "Commentaries on the Law of Promissory Notes"; which was received with the same favor as his earliest works.

For some time before his death, Judge Story had been meditating a resignation of his seat upon the bench. The distaste for locomotion, natural to declining years, was beginning to steal over him, and each year increased his disinclination to leave his happy home for a winter journey to Washington. He felt, too, that the voice of nature protested against the unbroken and exhausting labors which his judicial and professional duties, united, exacted of him, and demanded that something should be given up; and he had determined to devote his whole time and energies to the Law School, in which he felt an ever-increasing interest, and to the preparation of the legal treatises which he had meditated, but not executed. Besides, though his personal relations with his brethren of the bench were entirely agreeable, Washington was no longer to him what it had been in the days of Marshall. A change had come over the spirit of the Court; and the constitutional opinions of that illustrious man, and his own, no longer swayed the tribunal. He had been com-

pelled, in more than one instance, to dissent from the judgment of the Court, and he felt that in the future the divergence was more likely to increase than to diminish. From this duty of dissent he never shrank; but opposition and disagreement were not congenial to a nature so sympathetic as his.

In the early part of the year 1845, he had come to the fixed determination of resigning his judicial position; and he left Washington in the spring of that year with a heart all the lighter, from the thought that he was to return to it no more. Upon coming home, he immediately addressed himself to the task of clearing the docket of the Circuit Court, so as to leave no legacy of unfinished work to his successor. Many of the cases were intricate and difficult, and the arduous labors they required bore heavily upon his strength and vital energies; though, such was the buoyancy of his spirit, it was not perceived at the time.

The last time he appeared in public was on the third day of July, 1846, when a festival was given in celebration of the completion of a large addition to the Law Building, which the increase of the Law School had made necessary. An address was delivered by Mr. Choate on "The Profession of the Law as an Element of Conservatism in the State"; a brilliant and striking performance, included in the collection of his writings published after his death; but wanting, as read, that indescribable magic of voice and eye which gave force to its eloquence and wisdom when heard. After the address, the audience dined together in the library of Dane Hall. Judge Story made a speech, in which he gave a history of the foundation and growth of the Law School, and paid a generous tribute to Mr. Dane. The writer of this sketch was present on this occasion, and he well remembers Judge Story's high spirits and keen enjoyment of the day. He had never seemed in better health, and his whole manner betokened the satisfaction with which he looked forward to

the unbroken pleasures of domestic life and the uninterrupted discharge of the duties of his professor's chair. But these fond anticipations of future usefulness and happiness were not destined to be realized, and the end of earth was near at hand.

By the beginning of September, he had finished the hearing of all the cases pending before him, and had drawn up judgments in all but one, and that was nearly completed. The severe labor which these tasks imposed, and the heat of the summer, had greatly exhausted him; and, while in this prostrated condition, he took a slight cold, which was followed by a violent internal stricture, from which he was not relieved until after many hours of great suffering. But after the disease was conquered, his exhausted system did not rally. His strength daily declined, in spite of the best medical advice and the most careful nursing. On Sunday, September 8, he called his wife to his bedside and said to her, "I think it my duty to say to you that I have no belief that I can recover; it is vain to hope it: but I shall die content, and with a firm faith in the goodness of God. We shall meet again." In the course of his illness he said, that, but for his state of health, his letter of resignation would have been on its way to Washington. On Tuesday night, about midnight, a change took place, and it was evident that the hand of death was on him. Throughout the whole of Wednesday, September 10th, the tide of life was slowly ebbing from him. He lay mostly without consciousness, and apparently without pain, throughout the day; and at nine o'clock in the evening, his last breath was drawn.

The news of his death threw a gloom over the community, all the deeper from the fact that none but those who lived in his immediate neighborhood were prepared for it. His illness had been brief; he had not reached the period of life at which death seems a natural event; and there was something startling in the sudden transition from the exuberant activity

he had always shown, to the stillness of the grave. Resolutions were adopted, and speeches expressive of the highest respect and admiration were made at the opening of every court over which he had presided, and also of the Supreme Court at Washington. Several interesting discourses were pronounced from the pulpit in honor of him. On the 18th of September, the sixty-sixth anniversary of his birth, a beautiful and impressive eulogy upon him was delivered by his colleague, Professor Greenleaf, before the pupils of the Law School. In the courts of the United States, in New York, Pennsylvania, Tennessee, Louisiana, and Mississippi, his death was also appropriately noticed.

Judge Story was about five feet eight inches in height, with rather broad shoulders, and a compact and active figure. He was very animated in his movements, and, to the last, moved with the quick, elastic step of youth. His complexion was fair, his eyes were blue; and his hair in youth was auburn, but in early manhood he became bald. His mouth was large and full of expression. Of the many portraits and busts which were taken of him, there is no one which reproduces the full charm of his countenance, lighted up as it was by the readiest and most beaming of smiles, and glowing with kindliness of heart and unaffected sympathy. His manners were simple, unassuming, and cordial. Every thing about him — his look of welcome, the warm grasp of his hand, his hearty and contagious laugh — was expressive of a happy temperament, an affectionate heart, and a spirit singularly sweet and sunny.

He was a man of large capacity and various faculties; and with such intellectual force, such great propelling power, that, whatever might have been the sphere allotted to him, he could hardly have failed to have risen to eminence in it. His perceptions were wonderfully quick, but his knowledge was as enduring as it was readily acquired. His memory was "wax to receive, and marble to retain." And the accu-

racy of his knowledge was as remarkable as its extent, though this was sometimes questioned by those who did not know him well, and took it for granted that a mind so rapid in its movements could not be either exact or profound. His crowning and conspicuous quality was his industry, wherein no man within the writer's knowledge ever excelled and very few equalled him. Many men will work hard in order to secure the prizes of life, wealth, office, or fame; and, when these are won, they begin to grow self-indulgent, and are content to live on their intellectual capital, without adding to its stores. Not so Judge Story; for with him labor was a necessity of his nature, and he must have ceased to live before he ceased to work. The profession of the law, which he chose, was that which afforded the best scope and sphere to this persevering industry; for of eminence in the law it is not too much to say, that three parts out of four are made up of hard work. He was mainly, almost exclusively, a lawyer, and presented an example of an undeviating devotion to his profession more common in England than in our country, where professional eminence is apt to prove the stepping-stone to the more showy, and, to many natures, the more tempting, honors of politics. His love of literature continued through life; and his literary productions, though honorable alike to his talents and cultivation, were never regarded by him as any thing more than occasional relaxations from the severity of his professional and judicial toils, the "*solicitæ jucunda oblivia vitæ.*" It was as a lawyer and a jurist that he wished to be judged, and hoped to be remembered. And the lawyer labors under this disadvantage, that the general public can take but little part in awarding to him the meed of praise which is his due. The orator, the poet, the novelist, the artist, appeal to the popular judgment, and by this they must stand or fall. But not so with lawyers, nor, as a general rule, with men of science. These must be tried by their peers. The place of the lawyer is fixed by lawyers, as the place of the mathematician is fixed by mathematicians.

That Judge Story was a great lawyer, both in the original force of his mind and in his prodigious attainments, is what no man competent to judge, and free from prejudice, will for a moment deny. Judge Prescott, a man careful of his words, and not inclined to overpraise, said of him, in a letter written in 1840, "I believe him the greatest jurist now living in either country," meaning England and America; and that this would not be deemed too much to claim for him, even in England, may be inferred from the fact that Lord Campbell, in the course of a debate in the House of Lords, characterized him as "the first of living writers on the law." If among his contemporaries there were some who were not inferior to him in grasp of legal principles, in logical power, in accuracy of legal perception, there was no one who equalled him in the range and depth of his learning. In England, the division of legal employments limits the professional attainments of their lawyers and judges to a narrower sphere. One man devotes himself to equity law and one to common law, and neither intrudes upon the province of the other. Take the two brothers Lord Stowell and Lord Eldon, for instance; the former was confined to ecclesiastical and admiralty law, and the latter to equity law. But the jurisdiction of the courts of the United States compelled Judge Story to range over a far wider region of legal investigation than any English judge. He had to hear and determine questions in equity law, in commercial law, in admiralty law, in criminal law, in constitutional law, in the law of copyright, and patent law; the two last being branches of law which the judges of the State courts in America are not called upon to examine, except occasionally and incidentally. But in all these departments Judge Story's learning was profound, accurate, and ready. He was not, like some judges, strong in some points and weak in others, but in every part of the law he was upon perfectly familiar ground. Administering justice in a community largely engaged in commerce, he might be expected to be, as

he was, thoroughly versed in commercial law; but he was equally at home in all the technical and recondite learning of real property. He had made himself master of the uncouth lore of "Coke upon Littleton." With every department of equity law, the broad and liberal spirit of which was peculiarly congenial to his taste, he was as familiar as if he had been trained a chancery barrister, and sat on the bench as an equity judge. With the now obsolete science of special pleading he was perfectly acquainted, and recognized its value, alike as a means for expediting the despatch of business, and an excellent instrument for training the logical faculty. His opinions on constitutional law have in their careful analysis, luminous exposition, and vigorous grasp, no rivals save the immortal judgments of Marshall. In knowledge of admiralty law, alike of its origin, history, and practical application, there is no one but Lord Stowell to rival him; and, in learning, at least, the finished judgments of this great lawyer and accomplished scholar are not superior to those of Story.

To the important department of patent law, as administered and understood in America, Judge Story's contributions were more abundant and weighty than those of any other judge, or perhaps those of all his brother-judges on the bench during his time. The people of New England, as is well known, are full of inventive faculty, and most of the labor-saving machines and contrivances which have done so much to lighten the burden of the primitive curse are of New-England origin. Judge Story's circuit embraced four of the six New-England States; and during the whole of his judicial life, the dockets of his courts were crowded with patent-cases. When he first went upon the bench, the law of patents was in a rudimentary and imperfect state. In England, it had been a field of contest between the common-law lawyers and the equity lawyers; the former regarding a patent as a monopoly, and as such to be strictly construed, and the latter

viewing it with a more liberal spirit. But, in this conflict, practical injustice had often been done to inventors, and the system of patent law was wanting in symmetry and proportion. The courts of America, at that time, had contributed almost nothing to the science. In the earliest cases that were tried before him, the counsel were accustomed to apologize for their timid step and cautious movements, on the ground that they were traversing an unknown path. Judge Story prepared himself for the first patent case that came before him, by a thorough study of every reported case on the subject, and he kept pace with the rapid growth of the law during his time; and we do not think it is too much to claim for him the honor of being the most thorough and able patent lawyer that has yet administered the law, whether in England or America. Indeed, a good and satisfactory system of patent law might almost be compiled from his decisions alone. It was a department of the law which he took particular pleasure in studying and administering, where his quickness of apprehension and discriminating faculty found a congenial sphere, and he had a natural aptitude for comprehending mechanical contrivances and inventions. His learning and skill were guided by a liberal and generous spirit. In his eyes, the inventor was not a grasping monopolist, but a benefactor to his kind, whose substantial rights were never to be sacrificed to narrow technicalities; but were, if possible, to be always protected against unauthorized invasion, though they came under the specious guise of seeming difference.

Upon the kindred subject of copyright, several important questions came before Judge Story during his judicial life; and his opinions therein have the same merits of liberal interpretation and equitable construction as mark his judgments in patent cases.

To understand Judge Story's merits as a lawyer, he must be studied in his judgments, as contained in the Reports of

Gallison, Mason, Sumner, and Story, exclusively devoted to his own circuit, as well as those found in the volumes of Cranch, Wheaton, and Peters, reporters of the Supreme Court of the United States. His text-books, admirable as they are, — affluent in learning, luminous in exposition, and abundant in illustration, — can hardly claim the same comparative rank as his recorded opinions. In these, the powers of his mind found exactly the expression that was best adapted and most congenial to them. The opinions of a judge in reported cases may be looked at in a twofold aspect: first, Are they correct as expositions of the law? and, second, What is their value as contributions to the literature of the profession? — and in both respects the opinions of Judge Story are of eminent worth. No man in America has done more to determine the law; and there is no one whose conclusions have been accepted with more general assent by the profession. But a judgment upon an issue of law may be correct in point of fact, and yet furnish very little help to the future inquirer who is pursuing a similar path of investigation. But the great excellence of Judge Story's opinions consists in the flood of learning which he pours over the subject under consideration. Many of them may be received as authoritative and exhaustive expositions of the law at the time they were pronounced, making all further or collateral research superfluous. Thus to the student who is investigating a legal question, and not merely seeking the solution of a legal problem, his judgments have a value hardly equalled by any in the whole range of legal literature, whether English or American. This may seem a strong statement; but it is not lightly made, and it could not be supported without going into a discussion which could be interesting, or indeed intelligible, only to the professional reader.

As a *nisi-prius* judge, presiding over jury trials, Judge Story was remarkable for the quickness of his perceptions, and the uniform courtesy with which he treated all who appeared

before him. His mind was always rapid in its movements; and few men that have studied so much have ever learned so quickly as he. Long familiarity with judicial duties had enlarged a power always great; and upon the bench he displayed a quickness of comprehension that was like intuition or inspiration. The many questions of evidence and practice that came before him were decided without a moment's hesitation, and on grounds that were sufficient to any man who had not given up every thing to his client, and left nothing for the truth. His manners on the bench were the natural expression of his sweetness of nature, and they had all the charm that belongs to what is true and spontaneous. His countenance always wore a winning and benignant look, and the longest and dullest case never seemed to throw over it the slightest cloud of gloom or irritability. And his courtesy was uniform, recognizing no distinction of age or professional rank. Indeed, his kindliness of heart inclined him to turn a countenance of peculiar favor to the young, the self-distrustful, and the unsuccessful. When he had occasion to suggest to a lawyer some case that he had overlooked, or some principle that had escaped him, he did it in a way that left no sting behind. He never indulged in sneers or sarcasm, and did not allow himself those judicial sallies, which, though they may make the by-standers smile, rarely fail to disconcert a sensitive advocate, already perhaps overburdened with the care of a difficult or hopeless case.

But there is no judge that escapes criticism. In every case that is tried before a jury, one party must lose; and there are few lawyers that are philosophical enough to ascribe their defeat to essential defects in their law or their facts, still less to their own want of skill or tact. Thus Judge Story was sometimes accused of indicating, in his charges to the jury, a little too distinctly on which side he thought their verdict ought to be. If this were true, — and perhaps the charge is not wholly without truth, — it was because of his strong love

of justice, and his earnestness of temperament; and it is a very slight flaw in a judicial reputation of such unrivalled brilliancy.

As a teacher, Judge Story was all that might be expected from his knowledge of the law, his love of the law, and his enthusiastic and sympathetic temperament. Every pupil who came within the sphere of his influence felt the magnetism of his presence. His glowing countenance, his earnest manner, his cordial smile, acted with kindling and animating effect upon all. He was one of those men that never grow old; and thus his perpetual youthfulness of spirit made him, so far as sympathy and comprehension went, the contemporary of his pupils to the last. He never lost his interest in his work; the hour when he was to meet his classes was welcomed with delight; and, when it had closed, he shut up his book and left his chair with regret. His long and varied experience at the bar and on the bench enabled him to illustrate the propositions of the text-book upon which he was lecturing with a large number of apposite cases and appropriate anecdotes; and he was fond, occasionally, when the opportunity offered, of giving his reminiscences of the great lawyers and advocates who had appeared before him. In his lecture-room there was nothing of formality or stiffness; every thing was easy and unceremonious; the great lawyer and magistrate — too great to require any barriers to protect his dignity from a near approach — was the most familiar, and even playful, of men. But never was there for a moment, on the part of the young men who sat under his instructions, the slightest expression of disrespect. Never was the relation between them forgotten. His pupils felt for him a peculiar mixture of veneration, gratitude, and love. He became the personal friend of all who showed a right to his friendship by their talents, industry, and worth. In them he never lost his interest, and their fate and fortunes were followed by him to the last with an almost paternal feeling.

The character of Judge Story as a man, what he was in the private and domestic relations of life, may easily be inferred from what has been before said. His marked traits were warmth and kindness of heart, quickness of sympathy, a freshness of feeling enduring to the last, an entire absence of self-assertion, a frank, open, unsuspicious temper, and a sweetness of nature, which nothing could change. As a son, brother, husband, father, and friend, he was all that duty could command or affection inspire. He never lost a friend but by death; and no man was more mindful of Dr. Johnson's injunction to keep his friendships in repair. His latest friends were the children of those who started in life with him. Few men were ever more loved or more mourned than he. His judgments of men were kindly and charitable; malice and bitterness were unknown to him; he not only never indulged in evil-speaking, but discouraged the practice in all, and reproved it in those whom he had a right to reprove. There was a peculiar charm in his presence, from his vivacity of feeling, his quick sympathy, and that youthfulness of heart which he kept to the last. There was nothing of torpor, languor, or apathy, either in his temperament or his manners. Much study was never a weariness to his spirit. After a long day of severe toil, joining the domestic circle, he would seem the gayest and youngest of the party, whoever might be present. He was very fond of society, though too busy to indulge himself in it often. He was entirely independent of those amusements in which most men of laborious lives find a grateful, if not a necessary, relief from the burden of habitual toil. He cared nothing for farming or gardening; he probably never had a gun or a fishing-rod in his hands; he never played cards, or rode on horseback, or even took a walk for exercise. Occasionally, though very rarely, the presence of a great performer tempted him to the theatre. He was fond of listening to music if it came in his way; but he did not care enough about it to go after it. There was no pleasure he enjoyed so

much as conversation, and it was his only relaxation. He was sometimes accused of taking more than his fair share of the discourse in mixed society; but this was a charge never brought against him by his pupils, who were always happy to be listeners in his presence.

To the honors of general scholarship Judge Story made no claim. His attainments in literature were mostly confined to his own language, and in this they were more than respectable. In his youth, he had made himself well acquainted with the standard writers of England; and he found time to read the popular authors that rose to distinction in his own day, from Byron and Scott to Dickens. Among the modern poets, his favorite was Crabbe.

His style — formed at a time when the poetry of Darwin was admired, and the prose of Junius was thought the perfection of English — was always somewhat wanting in simplicity and compactness, though flowing, persuasive, and sometimes eloquent. His literary productions, it should be remembered, were always written rapidly, to meet a particular occasion, and in moments stolen from professional toil.

The life and character of Judge Story had the crowning grace of a strong and practical religious faith. He had a firm belief in the divine origin of Christianity, the result of reflection and inquiry; and he often expressed a purpose of writing a work in which the rules of legal evidence should be applied to the facts of the gospel narratives, and the question of their truth argued like a case in a court of justice. The joys and sorrows of his life were received by him as alike expressions of the will of God. He was submissive under trial, and deeply grateful for the blessings which had fallen to his lot. His life had been eminently successful, and, with the exception of the loss of so many children, it had been eminently happy. He has more than once said to the writer of this sketch, that the honors he had earned and the position he had won were far above the fondest dreams of his youth. His gratitude to God

was a strong personal feeling, like that of an affectionate child to a wise and loving father. He had, in a large measure, the Christian virtue of humility. No man ever assumed less or claimed less for himself than he. A man's character is never fully gauged till we know what he was to his inferiors, — his children, his servants, and his dependants. No man would have borne this test better than Judge Story; for he was best loved by those who stood the nearest to him and saw the most of him. He was kind to all and courteous to all, simply because kindness and courtesy were a part of his nature, and never had to be put on. In his declining years, his conversation and society had peculiar attractions for the young; and the main reason of this was, that he never claimed any superiority over them, either by reason of age or high place. He mingled with them as an equal, sympathized with them as an equal; so that the shy and sensitive student who went into his presence with fear and trembling, became his trusting friend, and often opened to him the most secret chambers of his heart. His influence over the young was always for good. He spurred the indolent, encouraged the desponding, and confirmed the irresolute.

Alike by precept and example, he discouraged harsh judgments, evil-speaking, and the spirit of strife. He was very fond of enforcing and dilating upon the truth, that no man ever stands in another man's way. The world, he said, was wide enough for all; and, if any one lacked advancement, it was his own misfortune or his own fault, and not the fault of any one else.

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